No. 77-1036

In the Supreme Court of the United States

OCTOBER TERM, 1977

JEAN D. LARSEN, INDIVIDUALLY AND AS THE ACTING COMMISSIONER OF LABOR OF THE VIRGIN ISLANDS OF THE UNITED STATES, APPELLANT

v.

ALFRED ROGERS, ET AL.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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This brief is filed in response to the Court's order of April 17, 1978, inviting an expression of the views of the United States.

JURISDICTION

Appellant invokes 28 U.S.C. 1254(2) as the jurisdictional authority for this appeal. That Section provides for an appeal to this Court "by a party relying on a State statute held by a court of appeals to be

invalid as repugnant to the Constitution, treaties or laws of the United States * * *." Here, however, the law held invalid by the court of appeals is a statute of the United States Virgin Islands, a territory. It is not a State statute.

While we are unaware of any decision specifically addressing the applicability of Section 1254(2) to cases involving territorial laws, this Court has stated that its "practice of strict construction of statutes authorizing appeals dictates that [it] not give an expansive interpretation to the word 'State' " in that provision. *Fornaris* v. *Ridge Tool Co.*, 400 U.S. 41, 42 n.1. Applying this principle, the Court in *Fornaris* ruled that Section 1254(2) does not authorize appeals in cases involving statutes of the Commonwealth of Puerto Rico. Similar reasoning would appear to preclude interpreting "State" to include territories such as the Virgin Islands. See also *Granville-Smith* v. *Granville-Smith*, 349 U.S. 1, where this Court reviewed by a writ of certiorari a court of appeals decision invalidating a Virgin Islands statute.

Accordingly, appeal does not lie under 28 U.S.C. 1254(2), and appellant's jurisdictional statement must "be regarded and acted on as a petition for writ of certiorari * * *." 28 U.S.C. 2103.

QUESTION PRESENTED

The Immigration and Nationality Act, 66 Stat. 163, as amended, 8 U.S.C. 1101 *et seq.*, and regulations promulgated under it authorize the Attorney General to admit nonimmigrant aliens into the United States

for temporary but fixed periods to perform temporary services for which the Secretary of Labor has determined domestic workers are not available. A statute of the Virgin Islands, 24 V.I.C. 129(a) (1976 Cum. Supp.) authorizes the Virgin Islands Commissioner of Labor to order an employer to discharge an alien employee admitted by the Attorney General whenever the Commissioner determines that a domestic worker is available for the alien's job, whether or not the alien's federally established period of admission has expired.

The question presented is whether 24 V.I.C. 129 conflicts with the Immigration and Nationality Act and is therefore invalid under the Supremacy Clause of the Constitution.

STATEMENT

This case was brought by appellees, nonimmigrant alien workers in the Virgin Islands, alleging that they had been fired pursuant to a Virgin Islands statute, 24 V.I.C. 129(a), in violation of the Constitution of the United States. The district court denied appellees' request to enjoin enforcement of the Virgin Islands statute (J.S. App. A). The court of appeals, ruling that the statute violated the Supremacy Clause, reversed (J.S. App. B). This appeal followed.

The relevant statutory scheme and factual background are as follows:

1. *The Federal Statutory Scheme.* The Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, permits the admission of nonimmigrant aliens to perform temporary labor if domestic workers can-

not be found (8 U.S.C. 1101(a)(15)(H)(ii)).[1] The INA grants the Attorney General broad authority to determine the circumstances and conditions under which the alien temporary workers ("H-2 workers") may come to this country, and the duration and conditions of their stay. Section 1184(a) states that the admission of any alien as a nonimmigrant shall be for such time and under such conditions as the Attorney General may by regulations provide (8 U.S.C. 1184(a)). In turn, Section 1184(c) states that the question of importing any H-2 worker (and certain other nonimmigrant aliens) shall be determined by the Attorney General after consultation with appropriate agencies of the government, upon petition of the importing employer. The employer's petition is to be in such form and contain such information as the Attorney General shall prescribe (*ibid.*).

Pursuant to this statutory authority, the Attorney General has promulgated detailed regulations governing the admission and stay of H-2 workers (8 C.F.R. Part 214).[2] These regulations provide that an alien seeking admission as an H-2 worker must be the bene-

[1] This section provides for a class of nonimmigrant aliens defined as:

> (H) [aliens] having a residence in a foreign country which [they have] no intention of abandoning * * * (ii) who [are] coming temporarily to the United States to perform temporary services or labor, if unemployed persons capable of performing such services or labor cannot be found in this country * * *.

[2] These regulations are discussed in the court of appeals opinion (J.S. App. 14b-16b).

ficiary of an approved visa petition filed by an employer. Whenever an H-2 worker who has been admitted to the United States seeks to change employment, a new petition must be submitted (8 C.F.R. 214.2(h)(1)).

The regulations further provide that the employer's petition must be accompanied by a certification from the Secretary of Labor stating that qualified workers in the United States are not available and that the employment of the alien worker will not affect the wages and working conditions of workers in the United States similarly employed, or by a notice that such certification cannot be made (8 C.F.R. 214.2(h)(3)(ii)). In addition, a detailed statement must be furnished with the petition stating why it is necessary to bring the alien to the United States and whether the need is temporary, seasonal, or permanent (8 C.F.R. 214.2(h)(3)(iii)). If approved, the petition is in force for the period of the validity of the labor certification, or, if the certification does not contain an expiration date, for one year from the date the certification was issued (8 C.F.R. 214.2(h)(7)).[3]

The beneficiary of an approved petition may apply for admission to the country as an H-2 worker dur-

[3] If a labor certification is refused, the petitioner may present countervailing evidence that qualified persons in the United States are not available and that the employment policies of the Department of Labor have been observed. Such evidence will be considered in the adjudication of the petition (8 C.F.R. 214.2(h)(3)(i)). A petition approved without labor certification is valid for one year from the date of the approval of the petition itself (8 C.F.R. 214.2(h)(7)).

ing the period of validity of the petition. In general, the authorized period of his admission is governed by the period of established need for his services, but cannot extend beyond the expiration date of the petitions validity (8 C.F.R. 214.2(h)(9). Extensions of stay may be granted, on the same terms and conditions, in increments of not more than twelve months each. In no event may the alien be granted an extension that would result in an unbroken stay in the United States of more than three years (8 C.F.R. 214.2(h)(11)).

2. *The Virgin Islands Statutory Scheme.* The United States Virgin Islands has also enacted a comprehensive scheme for regulating the employment of nonimmigrant alien workers. These statutory provisions, found in Title 24, Chapter 6 of the Virgin Islands Code Annotated, Sections 125 *et seq.* (1970), are concerned solely with H-2 workers; they do not apply to other nonimmigrant aliens who may be authorized to work, or to illegal aliens.[4] They are designed, in general, to protect persons in the domestic labor market from the competition of H-2 workers (J.S. App. 18b). They provide, among other things, that resident workers are to be given preference in employment whenever possible, that H-2 workers are to be em-

[4] The provisions of 24 V.I.C. 125 *et seq.* distinguish between "nonresident" and "resident" workers. Nonresident workers are specifically defined as those admitted to the United States pursuant to 8 U.S.C. 1101(a)(15)(H)(ii). Resident workers are defined as United States citizens and permanent resident aliens (24 V.I.C. 125).

ployed only to supplement the work force, and that no employer may employ any H-2 workers except in compliance with the provisions of the chapter and the regulations issued thereunder (24 V.I.C. 126).

Section 129(a) of Title 24, the provision at issue here, provides that the Commissioner of Labor of the Virgin Islands shall give written notice to the employer of an H-2 worker whenever he determines that there is an occupationally qualified citizen or permanent resident alien available for the H-2 worker's position; following receipt of this notice, the employer must terminate the H-2 worker's employment. The Commissioner may also give a similar notice if he determines, after investigation and hearing, that the public interest and welfare demand such action (J.S. App. 1d-2d).

3. *The Facts and Holding in This Case.* This suit was brought by nonimmigrant aliens who had been admitted to the Virgin Islands as H-2 workers. Alleging that they had been fired from their employment through application of 24 V.I.C. 129(a), they sought a declaration that the statute is unconstitutional and an injunction barring its enforcement against them and all persons similarly situated.

The district court dismissed the complaint (J.S. App. A). Relying principally on *Gannet Corp.* v. *Stevens*, 282 F. Supp. 437 (D. V.I.), which upheld the constitutionality of the minimum wage and hour provisions of 24 V.I.C. 125 *et seq.* against preemption and equal protection claims brought by an employer of H-2 workers, the court concluded that Section 129

(a) is not unconstitutional either on its face or as applied.

The court of appeals reversed (J.S. App. B). It concluded that 24 V.I.C. 129(a) is an obstacle to the accomplishment of the full purposes of the Immigration and Nationality Act and is therefore preempted by the INA and invalid under the Supremacy Clause of the Constitution (J.S. App. 23b). Resolving the case on the ground of preemption, the court of appeals found it unnecessary to reach the question whether the statute is also invalid on equal protection grounds (J.S. App. 6b).

ARGUMENT

Appellant agrees (J.S. 7) with the court of appeals that the proper standard for determining the issue of preemption in this case is whether application of the local statute "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines* v. *Davidowitz*, 312 U.S. 52, 67; *De Canas* v. *Bica*, 424 U.S. 351, 363. We also agree that that is the appropriate standard.

Applying that standard, the court of appeals correctly determined that the application of 24 V.I.C. 129(a) in the circumstances of this case is inconsistent with federal law and therefore offends the Supremacy Clause. The federal statute and implementing regulations authorize the Attorney General and the Secretary of Labor, through detailed and comprehensive procedures, to permit employers to

employ nonresident aliens for temporary but fixed periods of time, and correspondingly to permit such aliens to enter the United States for that purpose and for the designated periods. On the other hand, 24 V.I.C. 129(a), which is addressed specifically to H-2 workers, authorizes the Virgin Islands Commissioner of Labor to require an employer to discharge an H-2 worker at any time that the Commissioner determines that there is a qualified domestic worker available for the job, whether or not the federally established period for H-2 employment has expired.

Despite this inconsistency, appellant contends (J.S. 10-13) that the Virgin Islands statute does not conflict with the purposes of the federal statutory scheme because, appellant alleges, the underlying purpose of both the local and the federal statutes is to ensure that available domestic workers are not displaced by alien workers. The court of appeals correctly rejected that argument, noting that the federal statute and regulations are designed to balance two objectives: not only to protect the employment interests of domestic workers, but also to serve the interests of employers and promote the national economic welfare by assuring an adequate labor supply and some degree of continuity and certainty in the employment relationship (J.S. App. 21b-22b).[5]

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[5] The second congressional purpose is evidenced by the very provisions of the INA, outlined *supra*, pp. 3-6, that permit the admission of nonimmigrant aliens for the purpose of performing temporary services. See also *Saxbe* v. *Bustos*, 419 U.S. 65.

To accommodate these objectives the INA provides, in 8 U.S.C. 1184(a), that "[t]he admission to the United States of any alien as a nonimmigrant shall be for such time and under such conditions as the Attorney General may by regulations prescribe * * *." And the Attorney General's regulation, in turn, serves the dual objectives of the statute by providing, as a condition of admission, that the admission and employment of an alien worker shall be for a temporary but fixed period of time. The Virgin Islands statute, by permitting the Commissioner of Labor to terminate the alien's federally authorized employment at any time, authorizes the Commissioner to override the federal determination, to remove the certainty and disrupt the continuity of employment, and thus to obstruct accomplishment of one of the dual purposes of the federal statutory scheme.[6]

Gannet Corp., *supra*, and *De Canas* v. *Bica*, *supra*, on which appellant primarily relies, do not support appellant's position. *Gannet* involved an employer's challenge to those portions of the Virgin Islands statute that require employers of nonresident aliens to pay them the same wages as resident employees

[6] 24 V.I.C. 129(a) also conflicts with the federal system by giving the Commissioner of Labor the authority to determine the availability of domestic workers for particular jobs. Under the federal statutes and implementing regulations, that determination is vested in the Secretary of Labor through the certification process. See 8 U.S.C. 1184(c) and 8 C.F.R. 214.2(h)(3)(i). Local or state statutes such as Section 129(a) in effect authorize local authorities to overrule the Secretary's determination.

and to guarantee them certain minimum hours of work. The court's upholding of those provisions, which serve to protect alien employees, has little bearing on the validity of the provisions at issue here, which impose on alien employees conditions and burdens beyond those imposed by the federal statute and its administrators. Nothing in the federal statute or regulations concerning the admission of H-2 workers indicates a purpose inconsistent with local statutes designed to ensure them the same working conditions as resident workers.

But the federal system is inconsistent with local statutes authorizing local authorities to require the discharge of H-2 workers prior to the expiration of the federal work permit. As this Court said in *Takahashi* v. *Fish & Game Commission*, 334 U.S. 410, 419: "[T]he states * * * can neither add to nor take from the conditions lawfully imposed by Congress upon admission, naturalization and residence of aliens in the United States or the several states * * *." See also *De Canas* v. *Bica*, *supra*, 424 U.S. at 358, n. 6.[7]

De Canas not only fails to aid appellant, but supports the decision below. *De Canas* involved the validity of a California statute that imposed sanctions on employers who knowingly employ aliens who are "not

[7] While some of the language in *Gannet* suggests that the court viewed Section 129(a) as consistent with the purposes of the federal system (282 F. Supp. at 446), that language was plainly *dicta*, and the court of appeals in this case correctly declined to give it weight (J.S. App. 12b).

entitled to lawful residence in the United States * * *" (424 U.S. at 356). In holding that the state statute was not on its face in conflict with the purposes of the INA, the Court emphasized that "[t]he central concern of the INA is with the terms and conditions of admission to the country and the subsequent treatment of aliens lawfully in the country" (424 U.S. at 359). In this case, unlike *De Canas*, 24 V.I.C. 129(a) attempts to dictate "the subsequent treatment of aliens lawfully in the country."

Moreover, the Court in *De Canas* remanded the case for further inquiry on the question whether the California statute "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." 424 U.S. at 363. The Court observed that it was unclear whether the California statute would impose sanctions for employing aliens who, although not entitled to lawful residence in the United States, under federal law were permitted to work here, and stated (*id.* at 364): "[p]etitioners conceded at oral argument that, on its face, [the state statute] would apply to such aliens and thus unconstitutionally conflict with federal law." If, as the Court thus indicated, a State cannot constitutionally impose sanctions for employing aliens who under federal law are permitted to work in the United States, neither can a State or Territory directly order that such aliens be discharged.

CONCLUSION

The jurisdictional statement should be treated as a petition for a writ of certiorari and the writ should be denied.

Respectfully submitted.

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JUNE 1978.

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